

No. 11,491

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALLEN ZIEGLER, RAYMOND ZIEGLER and
WEST COAST SUPPLY Co. (a partner-
ship),

Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellee.

Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLEE'S NOTICE AND MOTION TO DISMISS THE APPEAL.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement

DAVID LONDON,
Director, Litigation Division

ALBERT M. DREYER,
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Subject Index

	Page
Notice of appellee's motion to dismiss appeal.....	1
Appellee's motion to dismiss appeal.....	3

Table of Authorities Cited

	Page
Borchard v. California Bank, 107 F. (2d) 96, certiorari granted 60 S. Ct. 721, 309 U. S. 348, reversed on other grounds, 60 S. Ct. 957, 310 U. S. 311, rehearing denied 61 S. Ct. 54, 311 U. S. 724.....	4
Brown Sheet Iron & Steel Co. v. Willeuts, 45 F. (2d) 390	4
Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719.....	4
Hutchinson v. Fidelity Inv. Association, 106 F. (2d) 431..	5
Lumbermen's Mutual Casualty Co. v. McIver, 110 F. (2d) 323	4
McCullough v. Kammerer Corp., 65 S. Ct. 297, 323 U. S. 327	4
Miller v. Union Pacific Railroad Co., 63 F. (2d) 574, reversed on other grounds, 290 U. S. 227, 54 S. Ct. 172....	4
Smith v. Boise City, Idaho, 104 F. (2d) 933.....	4
State of Washington v. United States, 87 F. (2d) 421.....	4
Traglio v. Harris, 104 F. (2d) 439.....	4
Weinstein v. Laughlin, 21 F. (2d) 740.....	4
Whealton v. Pine Grove Nevada Gold Mining Co., 104 F. (2d) 675	4

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Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellee.

**Appeal from the District Court of the United States for the
Southern District of California, Central Division.**

NOTICE OF APPELLEE'S MOTION TO DISMISS APPEAL.

To: Messrs. Lazarus and Horgan
Attorneys for Appellants
639 South Spring Street
Los Angeles 14, California

Please Take Notice that appellee will move the United States Circuit Court of Appeals for the Ninth Circuit to dismiss the appeal of appellants in the case above named on the grounds set forth in the motion hereto attached; that appellee will so move the said Court at such time as the Court may designate for

oral argument of the case at the United States Court-house, San Francisco, California, or at such other time and place as the Court may by order direct.

Dated, April 25, 1947.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement

DAVID LONDON,
Director, Litigation Division

ALBERT M. DREYER,
Chief, Appellate Branch

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APPELLEE'S MOTION TO DISMISS APPEAL.

The appellee herein moves this Court to dismiss the appeal for the reason that no reviewable questions are presented in the brief filed by the appellants. The record fails to show that any of the issues raised by them were raised, considered or decided below. Every point relied upon has been raised for the first time on this appeal.

It is well established that, whatever the nature of the case, the review by an appellate court is restricted

to such questions and issues as were made and considered below and decided there and no question, not going to the jurisdiction of the Court, can be raised for the first time on appeal. *McCullough v. Kammerer Corp.*, 65 S. Ct. 297, 323 U. S. 327; *Hormel v. Helvering*, 312 U. S. 552, 61 S. Ct. 719; *Traglio v. Harris*, 104 F. (2d) 439 (C.C.A. 9th, 1939); *Borchard v. California Bank*, 107 F. (2d) 96, 101 (C.C.A. 9th), certiorari granted 60 S. Ct. 721, 309 U. S. 348, reversed on other grounds 60 S. Ct. 957, 310 U. S. 311, rehearing denied 61 S. Ct. 54, 311 U. S. 724; *Whealton v. Pine Grove Nevada Gold Mining Co.*, 104 F. (2d) 675 (C.C.A. 9th, 1939); *Smith v. Boise City, Idaho*, 104 F. (2d) 933 (C.C.A. 9th, 1939); *Lumbermen's Mutual Casualty Co. v. McIver*, 110 F. (2d) 323, 325 (C.C.A. 9th, 1940); *State of Washington v. United States*, 87 F. (2d) 421, 435 (C.C.A. 9th, 1936).

This practice is founded upon considerations of fairness to the Court and to the parties, and of the public interest in bringing litigation to an end after fair opportunity has been afforded below to present all issues of fact and law. To hold the trial Court guilty of error on an issue to which its attention has never been called would violate this precept. Thus, the appellate courts have consistently declined to enter upon a discussion of questions which the trial Court was given no opportunity to rule upon. *Miller v. Union Pacific Railroad Co.*, 63 F. (2d) 574, reversed on other grounds, 290 U. S. 227, 54 S. Ct. 172; *Brown Sheet Iron & Steel Co. v. Willcuts*, 45 F. (2d) 390; *Weinstein v. Laughlin*, 21 F. (2d) 740.

The appellants challenge the validity of Third Revised Ration Order No. 3 on these grounds: that it is an unconstitutional exercise of the war power of Congress, in violation of the due process clause of the Constitution; that it is invalid because there was no sugar shortage in the United States at the time the preliminary injunction was issued, because there was no need of sugar for the defense of the United States, because the order conflicted with the provisions of the War Mobilization and Reconversion Act; and finally, that it was invalid at the time of defendants' illegal acts because it was inoperative at that time. In addition, they claim that the plaintiff below made no showing in the complaint or affidavits of impending or threatened acts on the part of the defendants and the District Court, therefore, erred in issuing the preliminary injunction.

Yet, the record brought up by the appellants is devoid of any indication that the questions raised by them on appeal were ever presented to the Court below for consideration and decision. It is apparent that they are endeavoring to use this Court as a forum for a hearing *de novo*.

The Fourth Circuit Court of Appeals disposed of such a maneuver in *Hutchinson v. Fidelity Inv. Association*, 106 F. (2d) 431 (1939), with the following words:

“The briefs discuss all sorts of questions not raised below but we need not consider them. The rule is well settled that only in exceptional cases will questions, of whatever nature, not raised and

properly preserved for review in the trial court, be noticed on appeal.”

The questions presented by the appellants should have been raised either by a motion below to dissolve the preliminary injunction or be reserved for the trial Court’s consideration when a hearing is set on the motion for permanent injunction.

It is, therefore, respectfully submitted that for the reasons outlined, the appellants’ appeal should be dismissed.

Dated, April 25, 1947.

WILLIAM E. REMY,

Deputy Commissioner for Enforcement

DAVID LONDON,

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